ACT CIVIL & ADMINISTRATIVE TRIBUNAL

"GC" v "OC" & "OJ" (Civil Dispute) [2016] ACAT 125

XD 1459/2015

Catchwords:	**CIVIL DISPUTE** – property damage claimed against a minor and a parent of the minor – intentional tort – trespass to goods - liability admitted by minor – liability contested by parent - quantum – evidentiary burden – costs – delay
Legislation cited:	*ACT Civil and Administrative Tribunal Act 2008* ss 16, 22, 39 *Magistrates Court Act 1930* s 262 *Civil Law (Wrongs) Act 2002* ss 42, 46, 48
Subordinate Legislation:	*ACT Court Procedure Rules 2006* r 277
Cases cited:	*Dryden v Orr* (1928) SR (NSW) 216 *Gorely & Anor v Codd & Anor* [1967] 1 WLR 19 *Palmer Bruyn & Parker Pty Ltd v Parsons* (2001) 208 CLR 388 *Smith v Leurs* [1945] HCA 27 *Surrey Insurance Co Ltd v Nagy* [1968] SASR 437 *Webster v Owners Units Plan No 3967* [2016] ACAT 58
List of Texts/Papers cited:	Butterworths, Harold Luntz, *Torts Cases and Commentary* 7th ed. (2013) Francis Trindale & Peter Cane, *The Law of Torts in Australia*, Oxford University Press, 3rd ed.
Tribunal:	Presidential Member E Symons
Date of Orders:	21 November 2016
Date of Reasons for Decision:	21 November 2016

AUSTRALIAN CAPITAL TERRITORY)
CIVIL & ADMINISTRATIVE TRIBUNAL) XD 1459/2015

BETWEEN:

"GC"
Applicant

AND: **"OC"**
First Respondent

AND**:** **"OJ"**

Second Respondent

TRIBUNAL: Presidential Member E Symons

DATE: 21 November 2016

ORDER

The Tribunal orders that:

1. The first respondent pay to the applicant damages of $320 plus the filing fee of $68, namely $388 by 1 March 2018.
2. Upon the payment of $388 in Order 1, the application against the first respondent is dismissed.
3. If the first respondent does not comply with Order 1 by 1 March 2018, then Judgment is entered for the applicant against the first respondent in the sum of $320 plus the filing fee of $68 plus interest on the $320 calculated in accordance with the *Court Procedure Rules 2006* from 19 May 2015 to 1 March 2018, $372.40, which totals $ 760.40.
4. The application against the second respondent is dismissed.

……..
Presidential Member E Symons

REASONS FOR DECISION

Background

1. The applicant owned a residential property in the Australian Capital Territory ('the premises') at all relevant times.

2. The applicant is the father of the first respondent and the second respondent is the mother of the first respondent. The first respondent is a minor.

3. In August 2014 the second respondent obtained a Domestic Violence Order ('the DVO') for herself and the first respondent against the applicant. In May 2015, by consent and without admissions, the DVO was extended for a further period of 24 months.

4. The first respondent entered the premises without the applicant's consent and damaged some of the applicant's property in March 2015. The first respondent was then aged 15 years.

5. Criminal charges of damaging the applicant's property were brought against the first respondent who pleaded guilty in the Children's Court of the Australian Capital Territory in September 2015. The Magistrate found the offences proved and dismissed both charges.

6. In October 2015 the applicant's solicitors ('the solicitors') sent letters of demand to the first respondent and to the second respondent seeking $5,000 for the damage to the applicant's property.

The History of the Proceedings

7. On 24 December 2015 the solicitors attempted to file a civil dispute application ('the application') in the ACT Civil and Administrative Tribunal ('the Tribunal') against the first respondent and the second respondent. Due to an underpayment of the filing fee the application was not accepted until 15 January 2016. In the application the solicitors had ticked the box identifying the type of application as:

> ***Damages Application:*** *An application to recover damages caused by negligence or other tort, except nuisance or trespass.*

8. In the section of the application entitled 'What is the dispute about?' the application states: *A claim for damages to personal property as set out in* [the solicitors'] *letters to the respondents dated 7 October 2015 and 22 October 2015.* The amount claimed is $5,000 plus filing fee and interest from 19 May 2015 up to judgment.

9. In their letter to the first respondent dated 7 October 2015 the solicitors state:

> *We are instructed that on 19 May 20115(sic)*[1] *you committed a burglary at our client's then* [premises] *located at* [address] *and during the course of the burglary, you caused damage to his personal property by setting fire to the carpet and stabbing his furniture approximately 250 times.*
>
> *We are instructed that you recently pled guilty to the offences in relation to this conduct at a Canberra Court.*
>
> *Please find* ***enclosed*** *by way of service:*
>
> 1. *Tax invoice from* [Carpet Business A] *dated 18(sic) May 2015 in the amount of $4,461.00; and*
>
> 2. *Electric massage chair quotation in the amount of $242.90.*
>
> *We are instructed that a sofa estimated by our client to cost $200.00 was also damaged by you beyond repair.*
>
> *Our client has paid to repair the damage to the floor and replaced a massage chair using his credit card. He is incurring interest charges.*
>
> *We are therefore instructed to request immediate payment of $5,000.00 to* [the solicitors'] *Trust Account. Our account details are as follows*
>
> ....

10. In their letter to the second respondent of the same date the solicitors enclosed the letter to the first respondent and stated:

> *We are instructed to notify you that as the parent of [OC] a juvenile, our client holds you responsible for his actions.*

[1] The date is incorrect. The first respondent agreed that the incident occurred between 6 and 17 March 2015.

11. On 12 February 2016 [first respondent's solicitors] filed a response on behalf of the first respondent and the second respondent filed her response. Both respondents disputed the applicant's claim.

12. In chambers orders were made on 23 February 2016 which listed the application for directions hearing on 9 March 2016 and made orders under section 39 of the *ACT Civil and Administrative Tribunal Act* 2008 (the ACAT Act) providing that:

    1. *The hearing of the application is to take place in private and closed to the public.*

    2. *The publication of (i) evidence given at any hearing of this application; or (ii) matters contained in documents filed with the Tribunal; or (iii) matters contained in documents received by the Tribunal that may identify the complainant or witnesses is prohibited.*

    3. *The names of the parties and other witnesses may be redacted from documents filed in these proceedings.*

13. On 6 March 2016 [first respondent's solicitors] filed a notice of representation for the first respondent.

14. At the directions hearing on 9 March 2016 the matter was adjourned to 6 April 2016 for further directions and the applicant was ordered to give to the Tribunal and each other party the following documents by 18 March 2016:

    (a) A written timeline of events;

    (b) A written statement by every witness who the applicant will call to give evidence at the hearing including himself;

    (c) Any further invoices, quotes, receipts, photographs, emails or other material the applicant relies upon; and

    (d) Submissions setting out the nature of the claim against each respondent.

15. On 1 April 2016 the applicant's solicitors lodged the applicant's submissions and a written statement from the applicant entitled "Victim Statement by [GC]" dated 25 March 2016.

16. At the next directions hearing on 6 April 2016 the matter was listed for hearing on 29 June 2016 and directions were made which, inter alia, listed the matter for a further directions hearing on 19 May 2016 and again required the applicant to give to the Tribunal and to each other person by 20 April 2016:

> *(a) any invoices, quotes, receipts, photographs, emails or other material the applicant relies upon relating to the partial replacement of the flooring.*

17. The directions also required the respondents to give to the Tribunal and to each other person by 18 May 2016:

> *(a)A response setting out the orders the respondent seeks;*
>
> *(b)A written timeline of events;*
>
> *(c) A written statement by every witness who the respondent will call to give evidence at the hearing;*
>
> *(d)Any expert's reports the respondent will rely on at the hearing;*
>
> *(e) Any invoices, quotes, receipts, photographs, emails or other material the respondent relies upon.*

18. These orders were mailed to the solicitors for the applicant and the first respondent and to the second respondent on 8 April 2016. The applicant did not file any further material in accordance with the directions. His solicitors emailed the Tribunal on 27 April 2016 stating:

> *The Applicant does not have any further evidence, invoices or receipts to provide to the parties and the Tribunal.*

19. On 10 May 2016 the second respondent filed her consent to be the litigation guardian of the first respondent with the Tribunal.

20. Neither the applicant nor his solicitors attended the next directions hearing on 19 May 2016. The tribunal contacted the solicitors by telephone so that the directions hearing could proceed with the solicitors participating by telephone. The timetable for the respondents to file their material referred to in [17] above was amended to 15 June 2016 and the matter was listed for another directions hearing on 9 June 2016. The order also stated:

Parties are advised that any failure to appear at the directions hearing may result in an order being made in their absence.

21. On 3 June 2016 the directions hearing listed for 9 June 2016 was vacated and the matter re-listed for 24 June 2016. A notice of listing for the changed date was emailed to all parties on 3 June 2016. Later, the first respondent's solicitor sent correspondence to the applicant's solicitors attaching the notice of listing advising of the directions hearing on 24 June 2016 at 1:00pm.

22. The second respondent filed and served her response and timeline of events on 10 June 2016.

23. The first respondent filed and served a response and his witness statement on 15 June 2016.

24. On 24 June 2016 neither the applicant nor his solicitors attended the directions hearing and his application was dismissed. The hearing date of 29 June 2016 was vacated.

25. The applicant filed an application for interim or other orders on 5 July 2016 in which he requested "*a new hearing date...so that he can be afforded the opportunity to attend."*

26. On 10 August 2016 his solicitors filed another application for interim or other orders seeking that:

    1. *The Orders made by the Tribunal on 24 June 2016 be set aside.*
    2. *That a new Directions Hearing date be set down.*

27. This was listed for hearing and on 30 August 2016 the Tribunal set aside the Orders of 24 June 2016 and listed the matter for final hearing on 14 October 2016. The applicant represented himself and confirmed both the quantum of his claim and the description of what the dispute was about as set out in the application dated 15 January 2016.

28. The parties agreed that the first respondent was not required for questioning at the hearing. Further directions were made for the applicant to provide a copy of DVD footage and any other material he relied on by 12 September 2016 and for

the respondents to provide any material in reply by 4 October 2016. The Tribunal noted that the respondents may make an application for costs at the hearing pursuant to section 48(2) of the ACAT Act.

29. The applicant filed a copy of the DVD. He did not file any other material by 12 September 2016.

30. The first respondent filed and served a further reply on 4 October 2016.

31. The second respondent filed her witness statement on 11 October 2016.

32. The application was heard on 14 October 2016. The applicant appeared by telephone and gave his evidence under affirmation. The first respondent's solicitor represented the first respondent and the second respondent appeared for herself. The second respondent gave sworn evidence. The applicant and the second respondent were cross examined. After hearing the parties' submissions the Tribunal reserved the decision.

The applicant's cause of action

33. In the application the applicant's solicitors did not describe the applicant's claim by referring to any particular cause of action.

34. They appear to be relying on negligence. Negligence is an unintentional tort. Where goods are lost or damaged as a result of a person's breach of a duty of care, an action may lie in negligence against that person. A claim based on negligence requires proof of damage.

35. It appears to the Tribunal that the cause of action should have been pleaded as an intentional tort, namely trespass to the applicant's goods or conversion. To destroy goods is to convert them, if done intentionally. This requires wilful or deliberate conduct, which directly caused injury to the applicant or his property and for which there was no lawful justification. It frequently involves conduct that results in criminal as well as civil liability. An applicant does not need to prove that he or she suffered harm for a respondent to be liable. The quantum of harm constituting a destruction for this purpose is clearly a question of degree, but damage as such is not a conversion. In the High Court decision of *Palmer*

Bruyn & Parker Pty Ltd v Parsons[2] Gummow J said in relation to damages in the intentional tortious act of injurious falsehood:

> *79. The relation between the damage intended and the damage suffered may be assessed differently according to whether the damage claimed is physical damage or economic loss. At least in the context of injurious falsehood, the question of whether there is a sufficient relation between the damage 'intended' and the damage suffered will generally depend upon whether the damage suffered was the 'natural and probable result' of the false statement.*

36. Damages for an intentional tort do not require foreseeability of harm; it is sufficient that harm is intended or is the natural and probable result.

Legislation

37. The tribunal's jurisdiction to hear civil disputes is set out in Part 4 of the ACAT Act. A 'civil dispute' is defined in section 16 of the ACAT Act, as follows:

> ***16. Meaning of civil dispute and civil dispute application—Act***
>
> *In this Act:*
>
> *"civil dispute "means a dispute in relation to which a civil dispute application may be made.*
>
> *"civil dispute" **application** means an application that consists of 1 or more of the following applications:*
>
> *(a) …*
>
> *(b) a damages application;*
>
> *…*
>
> *(f) a trespass application;*
>
> *(g) …*

38. This matter involves a damages application and trespass.

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[2] (2001) 208 CLR 388

39. The Tribunal's jurisdiction is found in subsection 22(1) of the ACAT Act which provides:

> *22 (1) The tribunal has, in relation to civil dispute applications, the same jurisdiction and powers as the Magistrates Court has under the Magistrates Court Act 1930 , part 4.2 (Civil jurisdiction).*

40. Section 262 is the relevant provision of the *Magistrates Court Act 1930* ('the MC Act'). The Tribunal is satisfied that section 262(a) of the MC Act is met as the respondents are both resident in the Territory.

41. Section 48 of the ACAT Act refers to the costs of proceedings and provides:

> *(1) The parties to an application must bear their own costs unless this Act otherwise provides or the tribunal otherwise orders.*
>
> *(2) However—*
>
> *(a) if the tribunal decides an application in favour of the applicant, the tribunal may order the other party to pay the applicant—*
>
> *(i) the filing fee for the application; and*
>
> *(ii) any other fee incurred by the applicant that the tribunal considers necessary for the application; or*
>
> ***Examples—subpar (ii)***
>
> - *a fee for a business name or company search*
> - *a filing fee for a subpoena*
> - *hearing fees*
>
> *Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act , s 126 and s 132).*
>
> *(b) if the tribunal considers that a party to an application caused unreasonable delay or obstruction before or while the tribunal was dealing with the application—the tribunal may order the party to pay the reasonable costs of the other party arising from the delay or obstruction; or*

(c) subject to section 49, if a party to the application contravenes an order of the tribunal—the tribunal may order the party to pay the costs or part of the costs of the application to the other party; or

(d) if the application is an application for review of a decision under the Heritage Act 2004 , the Planning and Development Act 2007 or the Tree Protection Act 2005 , and the tribunal makes an order under section 32 (2) (Dismissing or striking out applications)—the tribunal may order the applicant to pay the reasonable costs of the other party arising from the application.

*(3) For subsection (2) (d), **reasonable costs of the other party arising from the application** include reasonable legal costs but do not include holding costs.*

Examples—holding costs

- *interest and lender imposed charges associated with a loan*
- *costs of engaging workers and subcontractors and hiring equipment for a development*

The parties' contentions

42. The applicant seeks that the first and second respondents pay him $5,000 for the damage caused by the first respondent. He told the Tribunal that the first respondent has some legal responsibility for it. He contended that there was no legal excuse for the damage.

43. He said that he, the applicant, had no responsibility for the first respondent as he had had no contact with him for more than a year prior to the incident. He contended that the second respondent was liable for the damage caused by the first respondent because she has 100% responsibility for looking after him and *she failed to exercise parental control over a child for whom she is 100% legally responsible for; and therefore has a duty to pay the restitution in this case*.[3]

44. He said he was claiming the cost of replacing all the carpet in the premises, except for the carpet in the two bedrooms, because of the burns to his carpet in the living area. He replaced the carpet because the original carpet was no longer available and he did not want to patch the damaged area. He contended that the

[3] Victim statement by the applicant 25 March 2016, page 1

best option and least expensive option for him was to choose different flooring, namely bamboo flooring, which he had had installed in the entry hall, kitchen area, lounge area and hallway notwithstanding that the first respondent had not damaged the carpet in the entry hall, the tiles in the kitchen area or the carpet in the hallway. He contended that the respondents were liable for the full cost of the bamboo flooring which he had had installed, $4,461.

45. The applicant contended that the furniture, comprising a white two seater lounge and a black massage chair, was not useable after the first respondent stabbed them at least 250 times. He relied on photos of the damaged items annexed to his application to establish the damage. He contended that the value of his white two seater lounge immediately prior to the incident was $200 and that the respondents should pay him that amount for the damage.

46. He provided the Tribunal with a copy of an undated online advertisement selling a new black massage chair for $242.90 which he contended was identical to the chair which the first respondent had damaged and that the respondents should also pay that amount to him for the damage.

47. The applicant conceded that the actual amount he was claiming for the damage, $4,903.90, was rounded up to $5,000 in his application.

48. The first respondent did not deny[4] that he entered the applicant's premises in March 2015 and caused damage to the property comprising burns to a square of carpet in the living room comprising 1 metre x 1 metre in area and holes to four cushions of the two seater lounge. He had pleaded guilty to these charges in the Children's Court. He denied damaging an electric massage chair "*beyond repair, or otherwise.*" He contends that the applicant has not provided sufficient evidence to establish the losses he is claiming. He contests the quantum of damages as sought by the applicant.

49. He contends that the applicant had renovated the premises, after the incident, for the purpose of selling it and that the applicant claims the cost of replacing the floor coverings in the entry hall, kitchen, lounge and hallway under the guise of

[4] Response by first respondent at [1]

repairing the damage to the lounge area's carpet. He seeks orders[5] that judgment be entered for the applicant in the amount of $320 which he contends is the cost of supplying and laying one strip of carpet matching the existing carpet as set out in the quotation from [Carpet Business B] [6].

50. The second respondent contends[7] that she is not liable for OC's actions, that OC acted alone and that Consent Family Court Orders[8] dated 8 January 2006 provide, inter alia, that she and the applicant have joint responsibility for making decisions concerning OC's long term care, welfare and development. She contends that she was unaware of OC's involvement in the incident until he was interviewed by the police. She also contends that the applicant has not provided sufficient evidence to prove that she was responsible for the damage.

51. She contests the quantum of damages as sought by the applicant contending that it was the applicant's decision to repair the damage to the carpet by replacing the carpet in the entire lounge area and in the entry and in the hallway and the tiles in the kitchen; he choose the materials used and the price; he never consulted either of the respondents about this cost before or at the time he was incurring it and she had attempted multiple times to resolve the matter with the applicant. She asks that the application be dismissed.

Issues

52. The issues for determination are:

(a) Whether the first and/or second respondents are liable in damages to the applicant?

(b) If either respondent is liable, what is the actual loss sustained by the applicant and the value of that loss?

(c) Whether a costs order or orders should be made?

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[5] Response by first respondent page 5 at [1]
[6] Annexure B to the first respondent's response
[7] Response by second respondent filed 12 February 2016
[8] CAF 13 of 2006

Consideration

Whether the first and/or second respondents are liable in damages to the applicant?

53. Minority is not a defence as such in torts. The Tribunal is satisfied that children are responsible for the consequences of their own wrongful acts and are therefore capable of being sued[9] as long as they understand the seriousness of and consequences of their actions. A litigation guardian must be appointed as otherwise all steps taken in the action including judgment will be taken to be irregular and set aside.[10]

54. The Tribunal has considered all of the evidence and is satisfied that, given the first respondent did not deny liability for the damage to the carpet and the white lounge (see [48]) and of the steps taken to obtain evidence of the cost of repairing the carpet damage (see [49] and [80]) that he understands both the seriousness of and the consequences of his actions. The Tribunal is also satisfied and finds that the first respondent's actions were direct, voluntary and intentional. He should be liable for his actions.

55. In relation to the liability of the second respondent; at common law, parents are not vicariously liable for the actions or omissions of their children, whether intentional, reckless or negligent, unless there exists some other relationship between the parent and child such as employer and employee.[11] A parent may be responsible if his or her child acted on the parent's behalf, or with the parent's consent, or if the parent did not properly supervise or control the child and this led to the loss. Such personal liability requires proof of negligence in the parent. So far in Australia only the Northern Territory imposes statutory liability on parents for intentional damage of property by a child ordinarily resident with them and not in full time employment which is subject to a maximum limit of $5,000.[12]

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[9] *Gorely & Anor v Codd & Anor* [1967] 1 WLR 19
[10] *Surrey Insurance Co Ltd v Nagy* [1968] SASR 437 at 439
[11] Butterworths, Harold Luntz and Ors, *Torts Cases and Commentary* 7th ed at 7.7.30
[12] *Law Reform (Miscellaneous Provisions) Act* (NT) section 29A

56. In *Smith v Leurs*[13] the High Court of Australia considered whether or not the parents of a boy aged 13 years who injured another child with a shanghai were liable for the actions of their child. Starke J said:

> *The question whether parents have exercised the care that reasonable and prudent parents would have exercised in the control of a child is one of fact having regard to all the circumstances of the case, and the answer to that question must vary with those circumstances. In the present case, the Supreme Court on appeal concluded that the parents had not been guilty of any breach of their duty in allowing the infant defendant to have possession of a "shanghai" and that conclusion appears to me reasonable and proper in the circumstances of this case. The opposite conclusion would exact from parents an obligation to control their children almost impossible of performance.*

Dixon J said:

> *... It is, however, exceptional to find in the law a duty to control another's actions to prevent harm to strangers. The general rule is that one man is under no duty of controlling another man to prevent his doing damage to a third.*
>
> ...
>
> *The standard of care is that of the reasonably prudent man, and whether it has been fulfilled is to be judged according to all the circumstances including the practices and usages prevailing in the community and the common understanding of what is practicable and what is to be expected.*

57. The Tribunal has carefully considered all of the evidence before it. There was no evidence before the Tribunal that would enable the Tribunal to be satisfied that the first respondent was acting as the second respondent's agent or with her authority at the time of this incident. Nor was there any evidence before the Tribunal that would enable the Tribunal to find on the balance of probabilities that she was negligent in not exercising proper control or supervision over the first respondent.

58. The Tribunal is not satisfied that the second respondent is liable for any of the damage claimed by the applicant. The application against the second respondent will be dismissed.

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[13] (1945) 70 CLR 256

What is the actual loss sustained by the applicant?

The carpet claim

59. The applicant claims $4,461.00 for the cost of replacing the flooring in his premises. Th**e** applicant conceded that immediately before the incident carpet was installed in the lounge, hallway, entry hall and the two bedrooms of the premises and that the kitchen area and bathroom were tiled. This was corroborated by the first respondent and by the photographs dated 25 July 2008 from the Allhomes website annexed to the first respondent's witness statement.

60. The applicant also conceded that he had replaced the carpet with a different type of flooring than was in the premises before the incident, namely a Verdura bamboo floating floor, and that he had installed the bamboo floor in the entry, hallway and kitchen, none of which had been damaged by the first respondent, as well as in the lounge area. The three photographs from the realestate.com.au website annexed to the first respondent's response corroborate this evidence.

61. The applicant relies on a quotation from [Carpet Business A] dated 18 May 2015 for $4,461. The quotation states it is for "*1,830mm x 130mm x 14mm (1.43sm per pack).*" This quotation also states: "*$100.00 added for take-up and disposal of existing ceramic tiles.*" This quotation was annexed to the solicitors' letter to the first respondent dated 7 October 2015.

62. In evidence the applicant said that he had sought three quotations for the flooring. One supplier did not reply and of the other two he chose the least expensive. He said he no longer had the second quotation in his possession. He agreed he had three options – (i) to patch the carpet, (ii) to replace all of the carpet in the property and (iii) to put different flooring in the lounge area. He said he went with option (iii).

63. In his witness statement dated 25 March 2016 the applicant states:

> *This was the least expensive option as the carpet burned in the attack was no longer available. I could have chosen to replace the carpet where it was laid in the living room and two bedrooms. I could not just replace the carpet in the living room as it would have been different to the carpet in the two bedrooms.*

64. The applicant said he had had oral discussions with [BJ] from [Carpet Business A] about the flooring. In cross examination he was asked if he had requested [BJ] to give him a breakdown of the cost of replacing the carpet in the lounge area and of replacing the carpet in the entry and hallway and a separate quote for pulling up the tiles and replacing them with timber flooring in the kitchen. He said:

> [BJ] *did the whole thing as one quote as a favour to me. The cost was the same whether I did just the lounge or the whole room. He did not charge me anything for removing the tiles.*

65. The applicant told the Tribunal he had not consulted the respondents when repairing the damage to the carpet as he was not then in a capable state to do anything. He described himself at that time as a shivering wreck and in fear of his life. At that time his first thought was that he was the victim. He also said the Domestic Violence Order prevented him from talking to the respondents unless it was about the first respondent's health and education. He agreed that his solicitors had written to the respondents on 7 October 2015, which was permitted by the Domestic Violence Order, and he said that was the first available opportunity he had had of contacting the respondents. He also said he did not have the funds to see a solicitor regularly.

66. The first respondent contends[14] that the amount in damages claimed by the applicant for the damage to the carpet is excessive because:

(a) the quotation is for an area that grossly exceeds the area of the damaged carpet;

(b) the wooden flooring is a different type of flooring than was in the premises at the time of the incident;

(c) the applicant has failed to establish that he had minimised his loss with respect to the damage as he failed to provide evidence that the damage to the carpet could not have been repaired without the need to replace the entire flooring including in areas of the premises which previously did not have carpet; and

[14] Response by first respondent filed 15 June 2016 at [8]

(d) he failed to provide evidence that the original carpet was unavailable and that it was justifiable in all of the circumstances to replace the original carpet with a more expensive wooden flooring.

67. The first respondent also contends that the applicant failed to provide evidence:

(a) of any enquiries or reasonable efforts he had undertaken to source carpet of the same or similar type to that laid in his lounge area prior to the incident; or

(b) that the carpet style was no longer commercially available at the time needed for the repairs; or

(c) that the bamboo flooring was the least expensive option.

68. In cross examination the applicant agreed that he sold the premises in August 2015 and was preparing it for sale when he obtained the quote from [Carpet Business A] but denied that he was renovating the premises. He said he was repairing the carpet damage for the cheapest option available. He said the other two quotes he had sought do not exist; the only one he could find was the quote from [Carpet Business A]. He agreed that the first respondent had not damaged the kitchen tiles, the carpet in the hallway or the carpet in the entry.

69. He relied on the quotation from [Carpet Business A] as evidence of the cost of repairing the carpet in the lounge area. When it was put to him in cross examination that notwithstanding two lots of directions hearings he had not provided documentary evidence that he had actually paid the amount in the quotation, he said that he had provided evidence that the flooring was done. He said he was under affirmation and that he had paid [Carpet Business A] by using his credit card and was still paying it off; he had not been asked by the first respondent's solicitor to provide his credit card statements to tribunal; he was not a lawyer; the Tribunal could have checked with [Carpet Business A] whether he had paid the account and that he was traumatized by the incident and by the questions at the hearing.

70. The applicant said in cross examination that he had purchased the property in 2008. He was adamant that the carpet in the lounge, entry, hall way and two bedrooms was identical before the incident. When it was put to him that he could have replaced the carpet in the lounge area only, he told the Tribunal that no sane person would do so as that would be like painting half of a room red and the other half blue.

71. When the Tribunal asked the applicant if [Carpet Business A] had suggested patching the burned carpet in the lounge area with carpet from the second bedroom which the applicant had claimed was identical carpet, the applicant told the Tribunal "*that had not been done because it was illogical, an irrational solution, a delusional idea, out of left field and not industry standard and would never be considered by a carpet professional*."

72. The Tribunal then ascertained from the applicant that the carpet in the entry was undamaged and would have been of sufficient size to patch the burned area in the lounge and asked if the carpet professional had suggested this to him to mitigate his loss. The applicant told the Tribunal that it was "*offering fanciful ideas to vandalise other carpet in his property*."

73. When the Tribunal asked the applicant if he proposed calling evidence from [BJ] from [Carpet Business A] the applicant said: "*If you want to inconvenience someone then you can call him.*"

74. When asked why he had not given either respondent the opportunity to repair the damage or arrange for appropriate valuations of the damage before he replaced the carpet and sold the premises, he repeatedly referred to the DVO obtained by the second respondent against him claiming that it prohibited him from contacting the respondents about the damage.

75. The Tribunal is satisfied that the DVO, a copy of which was Attachment D to the second respondent's response filed 12 February 2016, prohibited contact between the applicant and both respondents however it had a number of exceptions to this prohibition including "*except at counselling /mediation arranged with the consent of the second respondent, except through a solicitor and except in order to facilitate court proceedings*."

76. The Tribunal is not satisfied that the applicant could not have engaged solicitors, as he clearly did around 7 October 2015, to write to the respondents about repairing the damage shortly after he became aware of it or when he was obtaining the quotes in May 2015. The Tribunal accepted the evidence from the second respondent that she and the applicant had been attempting shuttle mediation by email through Conflict Resolution Service who brought the damage to the second respondent's attention.[15] It appears that the applicant did not raise, in these emails, the matter of repairing the damage and holding one or both of the respondents liable.

77. The first respondent had lived with the applicant for eleven weeks, from April to June 2014. The first respondent said[16] that he had visited the applicant's premises three or four times a week normally after he had bought the premises in 2008 until he lived with him between April and June 2014. He observed the carpet in the master bedroom was a darker colour and different in colour and height to the carpet in the guest bedroom and lounge, both of which were beige, and that this was shown in the Allhomes photos dated 25 July 2008 annexed to his witness statement.

78. He also said in his witness statement[17] that:

> *[the] damage to the carpet occurred in small spots in the living room, in an area no more than one metre by one metre.*
>
> …
>
> *17. At no point before being sent that letter [from the solicitors dated 7 October 2015] did the applicant ask me to fix the burns in the carpet or pay for them to be fixed.*
>
> …
>
> *18. I do not have any after school job. I have no means to pay anything to the Applicant.*

79. The second respondent relied on her contentions and her witness statement. She told the Tribunal that she had lived in the same unit complex as the applicant for

[15] Second respondent's witness statement dated 11 October 2016 at [10]
[16] First respondent's witness statement at [7], [8], [9]
[17] At [12]

a number of years and although she had had wooden floors laid in her unit she was on the owners corporation committee and knew what carpet had been laid in the other units. As well, she had been inside the applicant's unit on multiple occasions when he had invited her for a cup of tea. She and the first respondent were quite familiar with how the applicant kept his premises. While after a few years he did engage a cleaner, when she last visited the applicant's premises in 2014 she said the applicant's carpet was not generally in a good condition; there were quite a lot of markings. She described the condition of the carpet as 'used' and not clean.

80. The second respondent said she had discussed the damages claim for the carpet with the first respondent and on 2 June 2016 she had attended [Carpet Business B] and discussed repairing the burned area of the lounge carpet with the professional there who represented to her that the business was familiar with the complex in which the applicant's premises were located and that Coventry Carpet was the standard carpet laid in each of the units. She was able to identify from the swatches at the business the same carpet as had been installed in the applicant's unit, namely Coventry Carpet in Havana colour. She accepted the professional's advice that, as carpet came in rolls, she would not be able to replace the one metre by one metre piece damaged, but would need to purchase a strip and pay to have that installed. She obtained a quotation from [Carpet Business B] for her son which was annexure B to the first respondent's response for $320 to supply and lay the carpet strip.

81. The second respondent said to the Tribunal that the applicant had not provided receipts or bank statements to corroborate the payment for the wooden flooring. She expressed concern that he had not set out how he had calculated the damage instead claiming the cost of the replacement of all the floors in his unit except for the two bedrooms and the bathroom. She disputed the applicant's evidence that "*the cost was the same whether I did the lounge or the whole room*" adding that [BJ] was selling carpet and would be looking for a profit margin.

Conclusion

82. The Tribunal has carefully considered all of the evidence. The Tribunal is satisfied and finds that the applicant was at all relevant times the owner of and

had possession of the premises and the furniture and furnishings in the premises and that the carpet was damaged by the first respondent. The Tribunal is also satisfied and finds that the first respondent is liable to pay the applicant damages for the harm that he caused to the applicant's carpet.

Quantum

83. The most commonly adopted measure of damages for damage to goods is the cost of repairs.[18] The cost of repairs measure is subsidiary to the diminution in value measure: the plaintiff is entitled to the difference between the value of the chattel before the accident and its value immediately after the accident.[19]

84. The Tribunal does not accept the applicant's evidence that the damage done to the carpet could only be reasonably repaired by replacing all of it as well as the carpet in nearby areas and the tiles in the kitchen or that the cost of replacing the carpet in the lounge area was the same as the cost incurred for the new bamboo flooring. Such a proposition is not self-evident and if it is to be accepted, needs to be supported by relevant and probative evidence. The applicant did not arrange for [BJ] to give evidence and rebuffed the Tribunal's invitation to call him during the hearing. It is not up to the Tribunal to obtain evidence on behalf of a party.

85. The Tribunal accepts the applicant's evidence that he has paid [Carpet Business A] for the new flooring. The issue is whether the applicant has done all that is reasonable to mitigate his loss.[20] In other words, has he done all that is reasonable to avoid or reduce his losses?

86. The Tribunal is not satisfied that, in determining the quantum of the applicant's claim, the full cost of replacing the carpet in areas of the premises which were

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[18] Francis Trindale & Peter Cane, *The Law of Torts in Australia*, Oxford University Press, 3rd ed. Page 553

[19] *Dryden v Orr* (1928) SR (NSW) 216

[20] Queensland Court of Appeal decision in *Pialba Commercial Gardens Pty Ltd v Braxco Pty Ltd & Ors* [2011] QCA 148 at [95] - In *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 63 at 689 Viscount Haldane LC referred to compensation as the basic principle of damages and continued:
"But this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps."

not damaged properly or accurately quantifies the applicant's actual loss as the result of the first respondent's actions. The Tribunal had no evidence of the apportionment of the cost of the timber flooring for each of these areas and no evidence which could satisfy the Tribunal that the cost of wooden flooring was equal to or less than the cost of repairing the damaged carpet with a strip of carpet. The applicant had not, apparently, considered using carpet already in his property to replace that part of the carpet in the living area that was burnt. Had he done so then the cost of replacing either the carpet in the second bedroom or in the entry would, in all likelihood, have been considerably less than the cost he actually incurred and is claiming in these proceedings. His evidence in this regard was unsatisfactory. His evidence that [BJ] had not charged him anything to remove the tiles was contradicted by the quotation which clearly stated that $100 had been added for the take-up and disposal of existing ceramic tiles. His evidence in this regard was also unsatisfactory.

87. The Tribunal accepts the evidence of the first and second respondents on this issue and is satisfied that $320 is a fair and reasonable amount for the repair of the damaged carpet in the lounge area.

White Lounge

88. The applicant told the Tribunal he had owned the white lounge since 2011/2012 when he purchased it new for approximately $1,000. This would make the lounge three or four years old in March 2015. He said he has lost the paperwork for the purchase of the lounge because his computer has failed over the years and he has moved house a number of times. After he received the respondents' documents in October 2016 he said he went online to try to find a second hand sofa for sale to provide evidence of value. He submitted a printout and photo of a lounge he had discovered on line however, he filed this documentation well after the last date provided in the most recent directions hearing. The Tribunal upheld the first respondent's solicitor's objection to this material being accepted as evidence. The applicant had ample opportunity to file his material in accordance with the several directions made about that, by 12 September 2016.

89. The only evidence of the value of the white lounge as at the date it was damaged was the applicant's own assessment of $200. There was no evidence

before the Tribunal that would satisfy it that the applicant had the necessary expertise and qualifications to assess the value of the lounge and no evidence that provided a logical or reasonable basis from which a reasoned conclusion could be drawn about its value.

90. The applicant asserted that the fact that the white lounge had existed was evidence that he had owned it. This was not disputed but that fact does not provide evidence that assists to determine its proper value at the relevant time.

91. The first respondent contends that the applicant did not give him a reasonable opportunity to repair the damage to the lounge cushions. The photographs of the white lounge which the applicant attached to his Application show many black circles and numbers around the stab marks. The applicant agreed that he had made these marks but denied that the marks also damaged the lounge, adding that the black marks did not depreciate the value of the lounge. The applicant paid to have the lounge removed from the garage at his property.

92. The second respondent's evidence was that the applicant had purchased the lounge new between 2006, when he left the family home, and 2008, when he bought the premises and that it was, therefore, between 7 and 9 years old in 2015.

93. While the second respondent had seen the lounge when she visited the applicant's property, she had not been given any opportunity by the applicant to repair the damage or to get the lounge valued.

94. Having considered the evidence, the Tribunal finds that the applicant did not give either of the respondents the opportunity to arrange for the lounge to be valued.

Conclusion

95. The Tribunal has considered all of the evidence before it in determining what value, if any, should be applied to the lounge. The applicant's evidence of the age of the lounge was not convincing. He did not produce any documentation to corroborate when he purchased the lounge and the purchase price.

96. Accepting the statements that the applicant made during the hearing that he was and continues to be traumatised by the incident, (which may explain why he did not get evidence of value), there was simply no probative evidence of the value of the lounge immediately before the incident, or of the cost of repairing the cushions, or even of whether the cushions could be repaired. In the absence of such evidence the Tribunal cannot be satisfied that the applicant has established, on the balance of probabilities, the value of his loss. There is no other available evidence that the Tribunal can use to make a reasoned decision about the value and therefore, no amount can be allowed for this aspect of the applicant's loss.

Black Massage Chair

97. This claim also was problematic. While the first respondent denied damaging this chair, for the reasons set out below, it is not necessary for the Tribunal to determine liability.

98. The applicant relied on an online advertisement annexed to his application for an electric massage chair as evidence of its value. The advertisement is undated although it does state "*Delivery estimated between Thu. 8 Oct and Wed. 14 Oct.*" There is no receipt, or other documentation, evidencing payment by the applicant for this massage chair. It was not clear to the Tribunal whether the applicant was claiming that he had purchased this chair after the incident to replace the chair he alleges was damaged by the first respondent or whether this chair was the same chair he had purchased when he originally bought the chair. Either way this advertisement is not evidence of the value of the chair in March 2015. There was no other evidence. The applicant has not met the burden of proof in relation to establishing the quantum claimed for the damage to the black massage chair.

99. The Tribunal is satisfied from the evidence and finds that the applicant did not provide either of the respondents with the opportunity to arrange for the black Massage chair to be valued.

Other matters

100. The first respondent is a minor. He will attain 18 years of age on 1 November 2017. He is a full time student currently in Year 11. He has no source of

income. The applicant is his father. He gave evidence that he is presently unemployed and has debts. While at one stage he told the Tribunal during the hearing that he was not interested in the money, when cross examined about this statement he said:

> *Yes I am interested in restitution.....but my top priority is my love for my son. I am forced to do this to teach him right from wrong. The mother does not want to do that. The father wants to do that. I am the one being punished. I am making this application to seek restitution for damages caused to me as a victim because I am a victim because they did not accept my offer of settlement.*

101. After instituting the proceedings in the tribunal the solicitors for the applicant made an offer to settle the dispute "*…without damaging OC's future and credit rating /reputation.*"[21] Suffice it to say that this offer was not made on a 'without prejudice' basis and included a requirement that the second respondent provide monthly reports to the applicant until the first respondent attained 18 and thereafter the first respondent provide monthly reports himself to the applicant, about matters which are not within the tribunal's civil jurisdiction. Two weeks later the solicitors purported to add another condition to the settlement offer:

> *…if the monthly reports are postponed, late or cease without the agreement of my client, [OJ] will be in breach of the agreement and liable to pay $5,000.00 to [GC].*[22]

102. It is not surprising that the offers did not finalise the matter.

Costs

103. Both the respondents sought costs against the applicant pursuant to section 48(2) of the ACAT Act. The first respondent's solicitor submits[23] that the applicant and/or his solicitors failed to reasonably progress his application throughout the proceedings and caused unreasonable delay and obstruction while the Tribunal was dealing with the application by their ongoing failure to attend directions hearings on 6 April 2016, 18 May 2016 and 24 June 2016 when the application was dismissed. The solicitor for the first respondent claims that the [solicitor for first respondent] incurred additional legal costs in

[21] Email from [the solicitors] to Legal Aid and the second respondent dated 4 May 2016.
[22] Email from [the solicitors] to Legal Aid and the second respondent dated 17 May 2016
[23] Further reply by first respondent dated 4 October 2016 at [15] and [17]

appearing at the directions hearings on 18 May 2016 and 24 June 2016, in preparing for the hearing which had originally been scheduled for 29 June 2016 before the application was dismissed and subsequently in attending the hearing of the applicant's interim application to set aside the Order of 24 June 2016. These costs are assessed at $1,050 being $150 per hour for 10 hours.[24]

104. The solicitor for the first respondent referred the Tribunal to an earlier tribunal decision in *Webster v Owners Units Plan No 3967*[25] ('Webster') where the tribunal made an order for costs pursuant to section 48(2) on the basis that the respondent had failed to read the notice of hearing and directions orders which resulted in an unreasonable delay of the resolution of the matter. In Webster the tribunal said at [10]:

> *10. An award of costs does not automatically follow the outcome in ACAT. There must be factors evident in the matter, or in the manner in which the matter was conducted, which would justify the Tribunal moving from the presumption that each party bears their own costs. ACAT has a very narrow power to award costs. Section 48(1) of the ACT Civil and Administrative Tribunal Act 2008 (the ACAT act) provides that the parties to an application must bear their own costs unless this Act otherwise provides or the Tribunal otherwise orders. Section 48(2)(b) of the ACAT Act is the relevant provision to be considered in this application for costs. If the Tribunal considers that a party to an application caused unreasonable delay or obstruction before or while the Tribunal was dealing with the application, the Tribunal may order the party to pay the reasonable cost of the other party arising from the delay or obstruction.*

105. In the present matter, the Tribunal is in no doubt that the failure of the applicant's solicitors to attend the directions hearings, particularly on 24 June 2016, contributed to a delay of some three and a half months before the matter was heard. Unfortunately, it is not clear from the material filed when the solicitors ceased to represent the applicant. Had they continued to represent the applicant the Tribunal may have ordered that they pay the costs claimed by the solicitor for the first respondent. There was nothing to suggest that the applicant

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[24] Further reply by first respondent dated 4 October 2016 at [18, 19]
[25] [2016] ACAT 58

himself knew that his lawyers had failed to attend these events or that he personally contributed to the delays.

106. This application involves members of the one family. That is unfortunate. While the applicant has the right to bring these proceedings, he repeatedly told the Tribunal that he was traumatized by the incident, by the proceedings and by the questions asked of him at the hearing. He rejected a number of opportunities given to him during the hearing to withdraw his application. The first respondent's solicitor told the Tribunal that both the son and the former wife have found the applicant's application distressing. In these circumstances the Tribunal is not satisfied that ordering the applicant to pay the first respondent's costs incurred as the result of his solicitors' delay and non appearance, is appropriate. The Tribunal is not satisfied that the applicant was the author of his solicitors' inaction.

107. The second respondent also sought a costs order against the applicant pursuant to section 48(2) of the ACAT Act. The Tribunal, for the same reasons as it has declined to order that the applicant pay the first respondent's solicitors costs, declines to make the order sought by the second respondent.

Orders

108. The Tribunal is satisfied that the first respondent has no capacity to pay for the damage while he is a minor and attending secondary school full time. While he has a trust account with money left to him by the applicant's mother, the second respondent told the Tribunal that the trust defines that the money can be used for his health and education until he reaches his majority.[26] In these circumstances, the Tribunal is not persuaded that it should enter judgment for the applicant against the first respondent until the first respondent has had the opportunity to complete his secondary education and obtain employment. The Tribunal has determined that the first respondent be allowed a period of three months after his 18th birthday, until 1 March 2018, to pay the $320 and the filing fee. This way the first respondent will not have a judgment against him and his credit rating and reputation will not be affected.

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[26] Witness statement of second respondent dated 11 October 2016 at [27]

109. However, if the first respondent fails to make the payment by 1 March 2018, then the Tribunal will enter judgment against the first respondent and include an order that the first respondent also pay the filing fee and interest to the applicant from 19 May 2015, being the commencement date specified for interest in the Application, to 1 March 2018, calculated in accordance with the *Court Procedure Rules 2006* and the filing fee.

……..
Presidential Member E Symons

HEARING DETAILS

FILE NUMBER:	XD 1459 of 2015
PARTIES, APPLICANT:	GC
PARTIES, FIRST RESPONDENT:	OC
PARTIES, SECOND RESPONDENT	JO
SOLICITORS FOR APPLICANT	N/A
SOLICITORS FOR FIRST RESPONDENT	[first respondent's solicitors]
SOLICITORS FOR SECOND RESPONDENT	N/A
TRIBUNAL MEMBERS:	Presidential Member E Symons
DATES OF HEARING:	14 October 2016